

Legal Profession Board of Tasmania

Medium Neutral Citation:	Complainant v A Practitioner [2017] LPBT 63
Considered / Heard:	18 December 2017
Determination date:	20 December 2017
Jurisdiction:	Legal Profession Board, Tasmania
Before:	Mr K Pitt QC (Chairman) Mr G Jones (Legal Member) Mr A Mihal (Legal Member) Mr D Lewis (Legal Member) Ms J Paxton (Lay Member) Mr P Dane (Lay Member)
Determination:	That the complaint be dismissed pursuant to section 451(a) on the basis that there is no reasonable likelihood that the Practitioner will be found guilty of either unsatisfactory professional conduct or professional misconduct.
Catchwords:	PROFESSIONS AND TRADES- Lawyers- Complaints and Discipline- Professional misconduct and unsatisfactory professional conduct- alleged failure of barrister to follow instructions with regard to witnesses and other evidence for defence in a criminal trial- alleged over-charging- alleged lack of authority to transfer trust money.
Legislation:	<i>Legal Profession Act</i> (Tas) 2007 ss 420, 421, 451(a)
Case(s) Referred to:	<i>Law Society of Tasmania v Turner & Kench</i> [2001] TASSC 129 <i>Southern Law Society v Westbrook</i> (1910) 10 CLR 609 <i>Briginshaw v Briginshaw</i> (1938) 60 CLR 336 <i>Council of the New South Wales Bar Association v Asuzu</i> [2011] NSWADT 209
Category:	Determination
Parties:	(Complainant) (Practitioner)
File Number:	2017/63

REASONS FOR DETERMINATION

Background

1. This matter comes to the Board by way of a complaint received on 26 April 2017.
2. The Complainant sought the assistance of the Practitioner from early December 2014 with respect to criminal charges being brought against him.
3. In summary, the complaint relates to the Complainant's dissatisfaction with the manner in which the Practitioner conducted the Complainant's defence of the charges, particularly during the trial.
4. By a complaint dated 20 February 2015 the Complainant was charged with assault contrary to section 184 of the *Criminal Code 1924*. The charge was later varied by the Crown on indictment..
5. The Practitioner acted on the Complainant's behalf throughout, including in a three day trial in which the jury found the Complainant guilty on two counts of assault.
6. The Complainant was sentenced to five months imprisonment.

The Complaint

7. The Complainant confirmed to Board staff that the matters he wished to allege were that the Practitioner:
 - A. *Failed to provide an accurate or any updated advice as to the costs over \$5,500 for acting for the Complainant in circumstances where it was always known the matter would be heard in the Supreme Court;*
 - B. *Excessively charged for work completed in circumstances where the Complainant was unable to identify or establish that the charges were fair and reasonable, particularly at the appearances in the Magistrates Court on two separate occasions in 2015 and for the Supreme Court trial;*
 - C. *Constructed his fees to 'match' or exceed the Complainant's insurance excess so that the Complainant's insurance policy would respond to the fees;*
 - D. *Failed to act on instructions, specifically with respect to:*
 - a. *Contacting witnesses in support of the Complainant's defence;*
 - b. *Ensuring the full CCTV of the incident was played at trial.*
 - E. *Rendered an account to another law practice for \$6,410 in circumstances where the Complainant was the client, and the account was not rendered to him;*

- F. *By rendering the account of \$6,410 to another law practice, enabled the amount to be withdrawn from the trust account without the Complainant's permission or other authority;*
- G. *Failed to provide the Complainant with any or updated advice as to the merits of the Complainant's defence, in circumstances whereby the Practitioner gave the Complainant the impression his defence would be successful;*
- H. *Failed to provide the Complainant with any advice as to the merits of an appeal of the conviction other than verbal advice that there was 'no prospect'.*

8. On 26 June 2017 the Board decided that it was unable to summarily dismiss the complaint. An investigation in accordance with s 440 of the *Legal Profession Act 2007* ('the Act') therefore ensued.

Relevant legislation and the law

9. The Practitioner is an Australian legal practitioner within the meaning of s 6 of the Act . He holds a practicing certificate as a barrister and did so during the period relevant to the Complaint.

10. Section 420 relevantly defines unsatisfactory professional conduct as:

***unsatisfactory professional conduct** includes conduct of an Australian legal practitioner occurring in connection with the practice of law that falls short of the standard of competence and diligence that a member of the public is entitled to expect of a reasonably competent Australian legal practitioner.*

11. Section 421 of the Act relevantly defines professional misconduct:

professional misconduct includes –

- (a) *unsatisfactory professional conduct of an Australian legal practitioner, where the conduct involves a substantial or consistent failure to reach or maintain a reasonable standard of competence and diligence; and*
- (b) *conduct of an Australian legal practitioner whether occurring in connection with the practice of law or occurring otherwise than in connection with the practice of law that would, if established, justify a finding that the practitioner is not a fit and proper person to engage in legal practice.*

12. The legislative definitions are inclusive of the common law conduct definitions. The common law conduct definitions were stated in *Law Society of Tasmania v Turner & Kench* [2001] TASSC 129 by Crawford J:

[44] ... professional misconduct consists in behaviour on the part of a legal practitioner which would reasonably be regarded as disgraceful or dishonourable by legal practitioners of good repute and competency.

[49] ... in this State, unprofessional conduct extends to conduct which might reasonably be held to violate, or to fall short of, to a substantial degree, the standard of professional conduct observed or approved of by members of the profession who are of good repute and competency (the so called common law test)

13. The distinction between professional misconduct and unsatisfactory professional conduct is important and has significant consequences. It is clear, having regard to the legislative framework which sets out the sanctions available for each type of conduct, that professional misconduct requires conduct which is substantially graver than unsatisfactory professional conduct.
14. The burden of proof of any charge of unsatisfactory professional conduct or professional misconduct brought by the Board following investigation of a complaint rests with the Board¹. The standard of proof is the balance of probabilities but carries the rider that the weight or strength of the evidence necessary to prove a disciplinary matter varies depending on the circumstances and the gravity of the matter to be proved. This is known as the Briginshaw standard or the standard of “reasonable satisfaction”:

“reasonable satisfaction is not a state of mind that is attained or established independently of the nature and consequence of the fact or facts to be proved. The seriousness of an allegation made, the inherent unlikelihood of an occurrence of a given description, or the gravity of the consequences flowing from a particular finding are considerations which must affect the answer to the question whether the issue has been proved to the reasonable satisfaction of the tribunal. In such matters “reasonable satisfaction” should not be produced by inexact proofs, indefinite testimony, or indirect inferences. Everyone must feel that, when, for instance, the issue is on which of two dates an admitted occurrence took place, a satisfactory conclusion may be reached on materials of a kind that would not satisfy any sound and prudent judgment if the question was whether some act had been done involving grave moral delinquency.” Briginshaw v Briginshaw (1938) 60 CLR 336 per Dixon J at 362

Reasons for Determination:

A. Failed to provide an accurate or any updated advice as to the costs over \$5,500 for acting for the Complainant in circumstances where it was always known the matter would be heard in the Supreme Court;

17. It is apparent that the Complainant was incorrect when he alleged that the Practitioner did not provide him with any updated estimate of costs. The Practitioner provided an updated estimate by email in mid February 2015. The estimate for the costs of a Supreme Court trial was \$16,500- \$22,000. The Practitioner’s total fees were ultimately less than his estimate.

¹ *Southern Law Society v Westbrook* (1910) 10 CLR 609 at 626 per Isaacs J, at 627 per Higgins J

The Complainant has acknowledged that the email updating the costs estimate is in his records.

18. There is no reasonable likelihood that this allegation could amount to unsatisfactory professional conduct or professional misconduct.

B. Excessively charged for work completed in circumstances where the Complainant was unable to identify or establish that the charges were fair and reasonable, particularly at the appearances in the Magistrates Court on two separate occasions in 2015 and for the Supreme Court trial;

19. The total amounts billed by the Practitioner are shown in the following table:

Invoice Date	Work summary	Amount including GST
February 2015	Initial instructions, getting police disclosure and appearances in Mag. Crt	1500
August 2015	Preliminary Proceedings application, preparation for the same	1210
December 2015	Further preliminary proceedings application and appearances in S Crt	880
September 2016	Trial (3 days) and sentencing submissions	11,979.00
		Total billed: <u>\$15,569.00</u>

20. The review of the Practitioner’s file conducted during the Board’s investigation supports that the Practitioner did the work claimed for in his invoices. In summary:

- The Practitioner attended the Magistrates Court twice on the Complainant’s behalf: for the first appearance and then for the plea to be entered.
- He prepared two applications for preliminary proceedings and obtained preliminary proceedings orders. It was necessary to make two applications because the Crown disclosed further witness statements after the first preliminary proceedings had taken place. He conducted the preliminary proceedings and cross examined two witnesses on each occasion.
- He conducted the three day trial and made sentencing submissions.
- He attended the Court for the sentencing.
- He attended to obtaining client instructions and all the necessary correspondence with the Crown to enable the preliminary proceeding and the trial to go ahead.

21. The Board’s investigator reviewed the Crown witness statements, transcript of the accused’s video of interview, transcripts of the preliminary proceedings, the CCTV footage and the trial transcript of the evidence and other documents including the defence closing address as part of the investigation. The material, including cross examination conducted by the Practitioner,

establishes that the Practitioner had a detailed understanding of the Crown's evidence, his client's position and defence.

22. The Board considers that there is no reasonable likelihood that the evidence would establish that the Practitioner charged excessively for the work done on the Complainant's behalf. The Board notes the following matters in particular:

- The total amount billed for the work is lower than the range of estimates the Practitioner gave the Complainant for conducting a Supreme Court trial.
- The Practitioner was admitted in 1996 and is experienced in criminal law and the conduct of criminal trials. The hourly (\$330) and daily rates (\$2750) charged by the Practitioner are not excessive for a lawyer of his experience.
- It is clear that the Practitioner's charges are not excessive having regard to the number of attendances disclosed by the file review conducted by the Board's investigator.

C. Constructed his fees to 'match' or exceed the Complainant's insurance excess so that the Complainant's insurance policy would respond to the fees;

23. The evidence reviewed as part of the Board's investigation does not support the allegation that the Practitioner's fees were constructed based on the Complainant's insurance excess.

24. Correspondence from the insurer indicates that the insurer was willing to cover the Complainant's legal fees beyond an excess of \$10,000 (payable by the Complainant) up to \$50,000. This arrangement was subject to an undertaking that any monies paid by the insurer would be repaid if the Complainant was found guilty. The Practitioner therefore, in accordance with his client's instructions, responded to the Insurer's enquiries about the progress of the legal matter and the quantum of his fees for the reason that once \$10,000 had been paid by the Complainant, the insurer would start paying the Practitioner's bills. The Board can see no other relationship between the quantum of the Practitioner's fees and the Complainant's arrangement with his insurer. In any event, no inappropriate action by the Practitioner, is apparent.

D. Failed to act on instructions, specifically with respect to:

- a. Contacting witnesses in support of the Complainant's defence;**
- b. Ensuring the full CCTV of the incident was played at trial.**

25. So far as contacting witnesses is concerned, the Complainant's position is that he asked the Practitioner to interview some other witnesses who he felt could assist his case. The Practitioner's position is that he has no recollection of the Complainant asking him to do this and no notes of the same.

26. With regard to the CCTV of the incident, the Board understands the Complainant's position to be that footage before and after the incident should have been shown to the jury because it would have demonstrated:

- The number of times the patron came in and out of the premises;
- The aggression shown towards the Complainant by the patron and the patron's friends after the incident;
- That staff checked on the patron's welfare; and,
- That the patron was up and about after the incident which is inconsistent with the extent of the injuries that were allegedly inflicted upon him as a consequence of being dropped on the footpath.

The Practitioner's position with regard to the extra CCTV footage is that it would not have assisted with regard to the critical issues at trial.

27. No documentary or other evidence supporting the Complainant's allegation that he gave the Practitioner names and details of additional witnesses he should interview, has been located in the investigation. Without support for what the Complainant says, the Board considers that there is no reasonable likelihood that it could be proved to the required Briginshaw standard, that the Practitioner was provided clear instructions to approach additional witnesses.

28. Even if it could be demonstrated that the Practitioner was instructed to interview additional witnesses, the Board also notes that its investigation including obtaining further information from the Complainant about the witnesses he wanted the Practitioner to speak to. The Complainant identified these people for the investigator in the CCTV footage, and indicated the information he thought the witnesses could have provided. It was apparent from the review of the CCTV footage that neither of the witnesses could have given evidence of the force the Complainant used against the patron. The incident occurred in a matter of seconds. Both witnesses appear in the CCTV footage at a point which indicates they were too late to actually see the Complainant's removal of the patron from the foyer area and out onto the footpath.

29. The CCTV footage has been fully reviewed as part of the Board's investigation. The Board understands, based on information from the Complainant, that the jury were shown footage of:

- The patron entering the premises and being spoken to by the Complainant's colleague;
- The patron being escorted from the premises by the Complainant's colleague;
- The patron beginning to resist at the door to the premises entrance foyer;
- The scuffle in the foyer area in which some other people become involved;
- the Complainant taking the patron out and along the footpath in a headlock, and returning into screen being pursued by two of the patron's friends.

30. CCTV footage before and after the portions shown to the jury, has been reviewed as part of the investigation.

- The footage before the incident supports the patron's evidence about the time he had spent at the premises (about half an hour) and the number of times he had been in and out (once after his arrival). The material does not support the evidence of the Complainant's colleague that the patron had been in and out 3 or 4 times and been spoken to more than once.. The Board therefore considers the CCTV material prior to the incident would not have assisted the Complainant's case and may have been harmful to his case.
- The CCTV footage after the incident shows some aggression on the part of the patron's friends towards the Complainant. It also shows a member of staff walking along the footpath towards where the patron was said to be. It also shows the patron re-appearing with a cloth held to his face with what looks to be blood on it. It does not appear that it would have assisted the Complainant's case.

31. The Board considers that the critical question for the Complainant's defence was the reasonableness of the force used by the Complainant to remove the patron in the circumstances, and/or in his own self-defence. The Board considers that the Practitioner's position that the CCTV footage of before and after the incident did not assist with regard to the critical issues at trial, was a reasonable one.

32. The obligation upon lawyers to act in accordance with their client's instructions is not absolute. There are occasions upon which client instructions must give way to other overriding obligations. An easy example is where a client asks a lawyer to do something illegal, such as say paying a witness to change their evidence. Another example, which is perhaps less easy for clients to understand, is with regard to forensic decisions associated with a trial. The duty of a lawyer to the administration of justice includes obligations to exercise independent judgement with respect to the presentation of a client's case to a court.

Professor Gino Dal Pont describes the obligation as follows:

'Lawyers pressed by clients to 'make every point conceivable and inconceivable without judgement or discrimination' must exercise professional judgement so as 'not to use public time in the pursuit of submissions which are really unarguable'. This does not mean refraining from pursuing points unlikely to succeed, but determining those points that are reasonable arguable and jettison the rest. Mason CJ made the point as follows in Giannarelli v Wraith:

It is that a barrister's duty to the court epitomizes the fact that the course of litigation depends on the exercise by counsel of an independent discretion or judgment in the conduct and management of a case in which he has an eye, not only on his client's success, but also to the speedy and efficient administration of justice. In selecting and limiting the number of witnesses to be called, in deciding what questions will be asked in cross-examination, what topics will be covered in address and what points of law will be raised, counsel exercises an independent judgement so that the time of the court is not

taken up unnecessarily, notwithstanding that the client may wish to chase every rabbit down its burrow. (1998) 165 CLR 543 at 556

Lawyers should, therefore, not allow clients to assume control over litigation at the expense of their own independent judgement, or otherwise get caught within any client abuse of process and its consequences².

33. The obligation to exercise independent judgement is reflected in rules 4(e), 42, 43 of the *Uniform Barristers Rules 2015*, which were adopted in Tasmania in 2016. While these rules were not quite in operation in Tasmania at the time the Practitioner conducted the Complainant's trial³, they reflect the common law which pre-existed the rules and was then in existence.
34. The Board considers that the Practitioner's obligation to exercise independent judgement with respect to the presentation of his client's case enabled him to over-ride any instructions he was given by the Complainant to show the extra CCTV footage in the circumstances. There is therefore no reasonable likelihood of a finding of unsatisfactory professional conduct or professional misconduct as a consequence of allegation D.

E. Rendered an account to another law practice for \$6,410 in circumstances where the Complainant was the client, and the account was not rendered to him;

F. By rendering the account of \$6,410 to another law practice, enabled the amount to be withdrawn from the trust account without the Complainant's permission or other authority; [Allegations E and F are considered together for convenience]

35. The Board understands that it is not in dispute that the Practitioner sent an invoice in early September 2016 for \$6,410 to another law practice and that the law practice subsequently paid the amount to the Practitioner. The Practitioner did not advise the Complainant of the September 2016 invoice on or before the time it was issued.
36. The Board considers that there is no reasonable likelihood of a finding of unsatisfactory professional conduct or professional misconduct against the Practitioner for sending an account to another legal practitioner following the trial and the payment of that account by that legal practitioner without the Complainant's authority. This is because the obligations with regard to holding and disbursing trust money are owed by the law practice holding money in

² G E dal Pont, *Lawyers' Professional Responsibility*, 6th ed, Law Book Co. 2017, [17.40]

³ The trial was conducted on 30 and 31 August 2016 and 1 September 2016. The Barristers Rules commenced for Tasmania on 1 October 2016.

its trust account⁴, rather than by a barrister to whom money is owed:

243. Holding, disbursing and accounting for trust money

- (1) A law practice must –
 - (a) hold trust money deposited in a general trust account of the practice exclusively for the person on whose behalf it is received; and
 - (b) disburse the trust money only in accordance with a direction given by the person.

Penalty: Fine not exceeding 50 penalty units.

- (2) [Subsection \(1\)](#) applies subject to an order of a court of competent jurisdiction or as authorised by law.
- (3) The law practice must account for the trust money as required by the regulations.

Penalty: Fine not exceeding 50 penalty units.

- 37. Barristers are unable to hold trust money. At the time the Practitioner acted on behalf of the Complainant the rule preventing a barrister from holding trust money was rule 90 of the *Rules of Practice* 1994:

90. Professional conduct

A barrister must not –

- (a)
- (b)
- (c) in his or her practice, receive, hold or pay out money for or on behalf of a person; or
- (d) enter into an agreement, or have an understanding, with a legal practitioner for the sharing of fees, costs or profits; or
- (e) practise in a partnership or under an arrangement that resembles a partnership.

- 38. While the September 2016 invoice was not sent to the Complainant by the Practitioner, the material reviewed in the investigation indicates that the Practitioner had given information to the Complainant about the costs associated with his conduct of the trial: first, in his cost agreement which advises a daily rate for trial work; secondly, by his updated costs estimate with the estimate of a cost of \$16,500-\$22,000 to go to trial; thirdly, by emails prior to the trial requesting monies up to the balance of the Complainant’s excess be paid in advance to a solicitor before the trial commenced; and fourthly, by his invoice dated early September 2016 indicating that \$6,410.00 of the invoice for the costs of the trial had already been paid.

G. Failed to provide the Complainant with any or updated advice as to the merits of the Complainant’s defence, in circumstances whereby the Practitioner gave the Complainant the impression his defence would be successful;

- 39. At an early stage, the Practitioner advised the Complainant that it was open to acquit the Complainant on the basis of self-defence and the removal of a violent patron from the premises. His advice was not couched in definite terms and did not venture to predict what the jury would do. The Practitioner did not provide the Complainant with any further written advice.

⁴ See section 243 of the *Legal Profession Act*

40. Following being charged, the options for the Complainant were to either plead guilty or to go to trial and hope for a not-guilty finding. The consequences to the Complainant of a guilty finding were a likely term of imprisonment (either suspended or not) and probable loss of his employment. On the basis of the material reviewed in the investigation, the Board considers that the Practitioner's advice that it was open to a jury to acquit was reasonable advice to have given. The advice was not advice that the defence would be successful. The consequences of a guilty finding were serious. The chance of acquittal was worth going to trial for in the circumstances. Consequently, the Board further considers that there is no reasonable likelihood of a finding of unsatisfactory professional conduct or professional misconduct arising from the Practitioner's advice.

H. Failed to provide the Complainant with any advice as to the merits of an appeal of the conviction other than verbal advice that there was 'no prospect'.

41. The right of appeal against conviction and/or sentence is provided for in section 401 of the *Criminal Code 1924*:

401. Right of appeal

- (1) A person convicted before a court of trial may appeal to the Court –
 - (a) against his conviction on any ground which involves a question of law;
 - (b) with the leave of the Court, or upon the certificate of the judge of the court of trial that it is a fit case for appeal, against his conviction upon a ground of appeal –
 - (i) which involves a question of fact alone;
 - (ii) which involves a mixed question of fact and law;
 - (iii) which appears to the Court to be a sufficient ground of appeal; and
 - (c) against the sentence passed on his conviction, unless the sentence is one fixed by law.

42. There must be proper grounds for appeal. It is not enough to be dissatisfied or unhappy with the outcome. The appellant must convince the Court of Criminal Appeal that the jury's verdict should be set aside as unreasonable or unable to be supported; or that the Judge made an incorrect decision on a question of law; or that there was a miscarriage of justice.

43. In the case of the Complainant, the Practitioner suggested that he seek advice elsewhere about his chances of appealing. It was open to the Complainant to do so.

44. The Complainant says that a Legal Aid duty lawyer spoke to him after his conviction and advised him that he had a valid ground of appeal. The Board's investigator was not able to locate that lawyer. In any event, a Practitioner's advice does not constitute unsatisfactory professional conduct or professional misconduct simply because a different lawyer has an alternative view:

There are manifold uncertain of difficult areas of the law, and so the expression of an opinion or the giving of advice by a lawyer does not normally constitute a promise that the opinion or advice

is correct'⁵.

45. Even if the Practitioner's advice against appealing was later found to be incorrect, this does not necessarily mean that his conduct in giving the advice would amount to unsatisfactory professional conduct or professional misconduct. The standard is not one of perfection, but rather of the exercise of reasonable care and skill ⁶.
46. The Board's investigation located nothing suggesting a viable ground of appeal of the Complainant's conviction. No questionable judicial trial direction or order is apparent. There has been no assertion there was improper or prejudicial evidence having been presented to the jury during the trial. There has been no mention of wayward or unusual conduct on the part of jurors. The jury's verdict was reasonably available, upon the evidence reviewed in the investigation. The Complainant's sentence was within the range advised by the Practitioner and found in *Sentencing in Tasmania*⁷. The Board considers that there is no reasonable likelihood of a finding that the Practitioner's advice against appealing could amount to unsatisfactory professional conduct or professional misconduct.

DETERMINATION

The Board is satisfied that there is no reasonable likelihood that the Practitioner will be found guilty of either unsatisfactory professional conduct or professional misconduct as a consequence of the complaint, and the complaint in its entirety is therefore dismissed pursuant to section 451(a) of the Act.

Legal Profession Board of Tasmania

Per: 

Chairperson

⁵ Gino Dal Pont, *Lawyers' Professional Responsibility 6th ed. Lawbook Co. 2017*, [5.165] citing *Trust Co of Australia v Perpetual Trustees WA Ltd* (1997) 42 NSWLR 237 at 247 per McClelland CJ in Eq; *Heydon v NRMA Ltd* (2000) 51 NSWLR 1 at [147], [307] per Malcolm AJA, at [363] per McPherson AJA; *Carew Counsel Pty Ltd v French* (2002) 4 VR 172 at [29] per Winneke P.

⁶ *Council of the New South Wales Bar Association v Asuzu* [2011] NSWADT 209 at [50-51]

⁷ Kate Warner, *Sentencing in Tasmania 2nd ed, The Federation Press, 2002.*[11.321-11.324]

Please note that within 21 days after the date of this determination the complainant or the legal practitioner, the subject of the complaint may apply to the Disciplinary Tribunal or Supreme Court to have this matter heard by the Disciplinary Tribunal or Supreme Court and may make an application to the Disciplinary Tribunal or Supreme Court to stay the determination pending the finalisation of such an application.

Please be aware that an application made to either the Disciplinary Tribunal or Supreme Court may, in the event that application is unsuccessful, result in a costs order against you. Accordingly, it is recommended that independent legal advice is sought prior to making such an application.

Any application to the Disciplinary Tribunal must be in accordance with the form prescribed under the Legal Profession (Disciplinary Tribunal) Rules 2010 (see <http://www.lpbt.com.au/policy-and-guidelines/>).

The contact details of the relevant bodies are as follows:

Disciplinary Tribunal Secretary Mrs Maria Dwyer, Ogilvie Jennings: 6272 6860

Supreme Court, General Enquiries: 1300 664 608